

**THE LAW SOCIETY OF ALBERTA
HEARING COMMITTEE REPORT**

IN THE MATTER OF THE *Legal Profession Act*, and

**In the matter of a Hearing regarding
the conduct of ALLAN BOTAN,
a Member of The Law Society of Alberta**

SUMMARY OF RESULT

The facts and circumstances of the Member and of the Complaint against him are reasonably set out in the Agreed Statement of Facts entered into between Counsel for the Law Society of Alberta (LSA) and the Member, ALLAN BOTAN ("Mr. Botan"), which was marked as Exhibit 1 in these proceedings.

Mr. Botan was charged with one citation, namely:

- 1. The Member breached a trust condition, and such conduct is conduct deserving of sanction.*

The complaint alleged that Mr. Botan had breached a trust condition imposed upon him by the complainant, Ian Gledhill ("Mr. Gledhill"), and that such conduct was deserving of sanction.

Mr. Botan admitted the allegation against him, as set out in the Agreed Statement of Facts, and admitted that his conduct amounted to conduct deserving of sanction. Taking into account the admission of Mr. Botan, his effort undertaken to remedy the breach in a prompt and forthright fashion, and the complete absence of any history of prior misconduct over 29 years of practice, the Committee concluded that the protection of the public and the reputation of the profession were satisfied with the imposition of a reprimand. No award of costs was made against Mr. Botan.

INTRODUCTION

1. On October 31, 2013 a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society offices in Calgary to inquire into the conduct of the Member, Allan Botan. The Committee was comprised of Robert G. Harvie, Q.C., Chair, James A. Glass, Q.C. and Gillian D. Marriot, Q.C. The LSA was represented by Ms. Jane A. Corns. The Member was present throughout the hearing and was self-represented.

2. At the commencement of the hearing, counsel for the LSA and Mr. Botan presented the Hearing Committee with an Agreed Statements of Facts in relation to the one citation, marked as Exhibit 1 respecting the issues related to the Gledhill complaint, which sets out the circumstances relating to the matters in issue.

3. Further, as set out in paragraph 27 of Exhibit 1, the Member admitted his guilt to the citation and that his conduct was deserving of sanction, pursuant to Section 60 of the *Legal*

Profession Act. The Hearing Committee finds the Agreed Statement of Facts and Admission of Guilt to be in a form acceptable to it and for all purposes is a finding of the Hearing Committee that the conduct of Mr. Botan is conduct deserving of sanction.

4. On the basis of the Agreed Statement of Facts, an entry of guilty plea to the Citation, and for the reasons that follow, the Hearing Committee found the conduct of Mr. Botan to be deserving of sanction on the said citation. The Hearing Committee sanctioned Mr. Botan by issuing a reprimand, without further penalty or award of costs against him.

CITATION

5. The conduct of the member relates to a complaint brought by another lawyer, Ian Gledhill, resulting in the above stated citation. The essence of the complaint is that when Mr. Botan acquired the file of Mr. Gledhill, he received it subject to a written trust condition that:

"within 15 days following receipt of any proceeds of settlement or judgment, pay the balance of our account in the sum of \$12,679.50. In the event of a disagreement over the reasonableness of our account, the balance is to remain in your trust account pending a resolution of the agreement by consent, taxation or court order."

6. Subsequent to receipt of the file, Mr. Botan did in fact settle the two injury claims of the client in question, and did raise concerns with Mr. Gledhill regarding the propriety of the fees being claimed by him – suggesting that Mr. Gledhill consider accepting the sum of \$6,735.35 in total for his outstanding account under cover of a letter to Mr. Gledhill dated April 21, 2006.

7. Shortly after the April 21, 2006 letter, there was a further conversation between Mr. Botan and Mr. Gledhill. There is disagreement as to what occurred at this point – with Mr. Botan believing that Mr. Gledhill verbally agreed to accept that lesser amount, and with Mr. Gledhill denying any such agreement.

8. Regardless of the difference in recollection between the parties, on which point this panel is unable to make a finding in favor of the position asserted by either party on the evidence, it is acknowledged that at no time was the trust condition amended in writing.

9. At this point, it appears that sometime after this conversation, but before June 5, 2006, Mr. Botan paid the funds out from the settlement, retaining only \$6,735.35 in Trust.

10. On June 13, 2013, Mr. Gledhill sent correspondence to Mr. Botan suggesting that he was in breach of his trust condition for failing to retain the whole of the Trust funds as required in his letter transferring the file initially, to which Mr. Botan again asserted what he perceived to be the agreement to take the lesser amount referred to above.

11. On June 17, 2013, Mr. Gledhill filed the within complaint.

12. On July 21, 2011, Mr. Botan confirmed that the Trust funds had been returned to the sum of \$12,679.50 – however, notwithstanding that, the complaint was not withdrawn.

13. It should be noted, at this stage, that the initial advice given by the complainant, Mr. Gledhill, was that his client should accept a settlement for two separate claims, for a total of \$30,000.00.

14. It should be noted, at this stage, that the initial retainer of Mr. Gledhill was a contingency retainer, entitling him to receive 30% of any settlement received by his client, which, based upon the initial advice given by Mr. Gledhill to his client, would have suggested a fee entitlement of perhaps \$9,000.00.

15. Finally – it should be noted that as a result of what appears to have been an error on the part of the complainant to properly serve one of the Defendants, one of the claims initiated by the complainant, Mr. Gledhill, was struck – requiring that a claim be brought against the complainant himself, which was, in fact, ultimately paid out in favor of the client.

16. The foregoing comments are made to illustrate two things. Firstly, that it does appear that at all times, Mr. Botan was more than diligent in asserting the interests of his client, including taking all efforts required to protect the client's interest when they were put at risk as a result of the error of the complainant. It would appear clear that it was this attention to his client's interests that resulted in the complaint before this panel.

17. Secondly, although it occurred after this complaint was made, there was ultimately no prejudice to the interests of Mr. Gledhill, and the funds were restored to trust as had originally been undertaken relatively soon after this complaint arose. Notwithstanding that, the complainant persisted in this complaint.

17. This panel finds, as Mr. Botan now admits, that the obligation on the part of Mr. Botan was to assure full and complete compliance with written trust conditions until those conditions have been amended, *in writing*.

18. This is the requirement set out in paragraph 11 of the Code of Professional Conduct in force at the time of the breach in question which states:

11. The following rules govern the use of trust conditions:

(f) If the parties agree on an amendment to or clarification of the trust conditions, the amendment or clarification must be confirmed in writing.

18. By acting in contravention of a written trust condition, where, at best, there was an ambiguity between the parties as to whether or not the trust condition had been amended, the Member has breached his obligation to comply fully with the trust condition imposed upon him.

19. While the conduct of the complainant may, it appears, have been less than perfect in this matter – the nature of a Trust condition, being central to the concept of "Trust" in the profession and between counsel is a sacred obligation going to the heart of the integrity of the legal profession, and it is not an obligation that may be ignored or trivialized, regardless of the circumstances.

20. In this respect, the Member, while perhaps well intentioned, breached his obligation to the complainant and to the legal profession generally.

SANCTION

21. Section 49 of the *Legal Profession Act* defines conduct deserving of sanction:

49 (1) For the purposes of this Act, any conduct of a member, arising from incompetence or otherwise, that

(a) is incompatible with the best interests of the public or of the members of the Society, or

(b) tends to harm the standing of the legal profession generally,

is conduct deserving of sanction, whether or not that conduct relates to the member's practice as a barrister and solicitor and whether or not that conduct occurs in Alberta.

22. It is noted that there was a joint submission on the part of the Member and of Counsel for the LSA that an appropriate sanction in this case would be a reprimand, without further penalty.

22. Counsel for the LSA submitted the Member's conduct record, entered as Exhibit 21 in these proceedings disclosing that the Member has no prior discipline record with the Law Society.

23. There have been separate submissions made, by the parties, regarding whether or not an award of costs should also be imposed upon the Member as a result of the finding of guilt respecting the sanction in question.

24. To begin with, while the ultimate responsibility rests with this panel to make a determination consistent with the public interest and the interest of the legal profession, this panel is cognizant and recognizes the deference due to the parties making a joint submission regarding sanction. While a hearing panel is entitled to decline to accept a joint submission presented by the parties, it ought not reject such submissions lightly. Taking into account the existing jurisprudence and the public interest, only a joint submission which is truly unreasonable or unconscionable should be rejected.

25. There is no evidence to suggest that the joint submission is inappropriate. The absence of any prior history of misconduct on the part of the Member, the admission of guilt, and the fact that the error was corrected in relatively short order following the complaint, all make it clear that a reprimand is an appropriate sanction in the circumstances of this case.

26. Accordingly, for his failure to assure that the Trust condition imposed upon him was, at all times, complied with – the Member admits and is found to be guilty of conduct deserving of sanction – and has been reprimanded accordingly.

27. However, taking into account the relatively unusual circumstances of this case, and the other factors referenced above, it is found that an award of costs, in this case, is not necessary. As such, there shall be no award of costs as against Mr. Botan.

CONCLUDING MATTERS

28. The Hearing Committee Report, the evidence and the Exhibits in this hearing are to be made available to the public, subject to redaction to protect privileged communications, the names of Mr. Botan's client and such other confidential personal information.

Dated this 11th day of February, 2014.

Robert Harvie, Q.C. (Chair)

James Glass, Q.C.

Gillian D. Marriott, Q.C.